

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA

IN RE: . Case No. 08-35653(KRH)  
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CIRCUIT CITY STORES . 701 East Broad Street  
INC., . Richmond, VA 23219  
.  
.  
Debtor. . February 25, 2009  
. . . . . 2:02 p.m.

TRANSCRIPT OF HEARING  
BEFORE HONORABLE KEVIN R. HUENNEKENS  
UNITED STATES BANKRUPTCY COURT JUDGE

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1 UNIDENTIFIED FEMALE SPEAKER: All rise, court is now  
2 in session. Please be seated and come to order.

3 COURT CLERK: In the matter of Circuit City Stores,  
4 Incorporated, Case Number 08-35653, hearing on items on amended  
5 agenda as filed this morning.

6 MR. FOLEY: Good morning, Your Honor, Doug Foley with  
7 McGuireWoods on behalf of Circuit City. With me at counsel  
8 table is Gregg Galardi, from Skadden Arps. Also today in  
9 court, Your Honor, are three officers of the company. Mr. Jim  
10 Marcum, who you've seen before, who is the CEO, Michelle Moser,  
11 who is the CFO and Reggie Hedgepath who is the general counsel.

12 Your Honor, the items on the agenda, there's 13 items  
13 on the agenda today, many of them we're close to resolving  
14 and/or have agreed with the counterparties to adjourn them to  
15 the March 3rd hearing.

16 Just going through the order of the items on the  
17 agenda, Your Honor, the first matter is Principal Life  
18 Insurance, motion for relief from the automatic stay. I  
19 believe we have submitted to chambers an agreed order granting  
20 very limited relief from the automatic stay for the purposes  
21 that they were seeking with respect to instituting some  
22 foreclosure actions on a landlord. So, I believe that matter  
23 can be removed from the docket, Your Honor, as resolved.

24 THE COURT: All right.

25 MR. FOLEY: Your Honor, items number 2 and 3 are

1 related. They are AOL's motion and Platform A's motion for  
2 payment of administrative claim. We are continuing to work  
3 with them and they have agreed to adjourn both those matters to  
4 the March 3rd hearing date at 10 a.m.

5 THE COURT: That's fine.

6 MR. FOLEY: Your Honor, item number 4 is the motion  
7 by Federal Warranty and Assurant. We are actually having a  
8 meeting with them tomorrow, in person, here in Richmond to  
9 discuss that matters. We're hopefully going to reach a  
10 resolution of that and they have agreed to continue the matter  
11 until the March 3rd hearing date, Your Honor.

12 THE COURT: March 3rd, that will be fine.

13 MR. FOLEY: Yes, Your Honor. Your Honor, item number  
14 5 is the motion by D.L. Peterson Trust, as assignee for PHH  
15 Vehicle Management Services, to compel assumption or rejection  
16 of agreements and for relief from the automatic stay.  
17 Similarly, with the previous matter, Your Honor, we're working  
18 to try to resolve that matter consensually. They've agreed to  
19 adjourn the hearing until the March 3rd hearing at ten.

20 THE COURT: That will be fine.

21 MR. FOLEY: Your Honor, items number 6 and 7 are  
22 related. These are motions by Plumb Choice, one for relief  
23 from the automatic stay, one for payment of administrative  
24 claims. We have, this morning, been reconciling the amounts  
25 that we think they might be owed and they are agreeing to make

1 some concessions. We're very close. We think we're going to  
2 be able to submit an order before the March 3rd hearing date,  
3 but they've agreed and asked that we -- so they could avoid the  
4 trip down here today, to carry these matters over to the March  
5 3rd date.

6 THE COURT: That will be fine.

7 MR. FOLEY: Your Honor, I'm going to -- if it's okay  
8 with the Court, we'd like to pass over for the time being item  
9 number 8 which was a matter relating to the sale of certain  
10 defective inventory that was excluded from the otherwise  
11 inventory sale.

12 THE COURT: All right.

13 MR. FOLEY: The next two items, Your Honor, relate to  
14 the wind down incentive plan motion which is matter number 11  
15 on the agenda. Items number 9 and number 10, one is a motion  
16 to shorten time with respect to the underlying motion and  
17 number 10 is the motion to seal the names of the individuals  
18 and the proposed incentive compensation. There's been no  
19 objections to either of those two procedural motions, we'd ask  
20 that Court grant those, Your Honor.

21 THE COURT: Anybody wish to be heard in connection  
22 with matters number 9 and 10 on the Court's docket?

23 (No audible response)

24 THE COURT: All right. Both motions are granted.

25 MR. FOLEY: Your Honor, we'll pass over number 11,

1 just for a moment. We've resolved the issues with respect to  
2 number 12. This is the third omnibus motion to reject certain  
3 leases. There were two objections filed, one by Inland and one  
4 by Macy's and we've resolved both objections. The order, we're  
5 going to make some clarifying language that provides the  
6 rejection date is the later of the date that's set forth in the  
7 motion or the date the possession and keys are turned over to  
8 the landlord and both of the objectors are agreeable to that.

9 With respect to the Macy's objection, Mr. Epps is  
10 here. There was an issue regarding payment of the full amount  
11 of February's rent with respect to that location and we've  
12 agreed with Mr. Epps to the extent that February rent has not  
13 been paid in full, it will be paid in full. And I believe that  
14 resolves his objection.

15 THE COURT: All right. Do you wish to be heard, Mr.  
16 Epps?

17 MR. EPPS: Your Honor, only to confirm what Mr. Foley  
18 said.

19 THE COURT: All right, very good. Thank you, sir.

20 MR. FOLEY: Your Honor, that leaves items numbers 8,  
21 which Mr. Fredericks will address, who is here in court now,  
22 and items number 11, which Mr. Galardi will address.

23 MR. FREDERICKS: Good afternoon, Your Honor, Ian  
24 Fredericks of Skadden, Arps, Slate, Meagher, & Flom.

25 THE COURT: Good afternoon.

1 MR. FREDERICKS: By way of background, Your Honor, we  
2 originally, came before you on this motion on February 13th,  
3 and this was originally a motion to set up procedures to sell  
4 certain defective inventory. And as you might recall, we'd  
5 reached an agreement with the committee whereby we might  
6 explore an alternate proposal with the committee's consent, or  
7 if the committee didn't consent, by another further order of  
8 the Court.

9 We did receive two alternate proposals. We received  
10 the actual final proposals this morning. This morning we held  
11 an auction among those two bidders to purchase all of the  
12 defective inventory, free and clear of all liens. The initial  
13 proposal that was deemed to be the highest or otherwise best  
14 which we started the auction, was a proposal presented by  
15 Channel Velocity. It was for a purchase price of \$9 million,  
16 subject to a maximum purchase price adjustment of approximately  
17 \$350,000 and then a right to terminate the agreement if the  
18 variance, which will be determined through an audit conducted  
19 over the next couple of days, if that variance exceeded 15  
20 percent, the buyer had the right to terminate the agreement or  
21 the parties could negotiate a further purchase price reduction.

22 The other bidder, who had submitted a bit was Hyper  
23 Microsystems. During the auction, there was very competitive  
24 bidding and ultimately Hyper Microsystems presented the highest  
25 or otherwise best bid on the Channel Form APA and a purchase



1 price of \$12.2 million. So, there was an increase from the  
2 initial bid of approximately \$3.2 million.

3 At the conclusion of the auction and after  
4 consultation with the creditor's committee's professionals, the  
5 debtors determined that the highest or otherwise best bid was  
6 that presented by Hyper Microsystems.

7 It is my understanding, based on discussion with the  
8 committee's professionals that they have a meeting tomorrow,  
9 that the committee's professionals will be recommending that  
10 the committee accept this proposal. And so, we anticipate  
11 we'll have committee consent tomorrow and, thus, there will be  
12 no further need of a court order. In lieu of a court order,  
13 we'll file the sale notice in accordance with the current  
14 order.

15 To the extent that the committee for some reason does  
16 not consent, we would ask the Court that we be permitted to  
17 come back on March 3rd, to have a hearing to consider this  
18 proposal. The closing is scheduled for March 4th, and the  
19 audit is anticipated to be completed on March 2nd.

20 With that presentation, Your Honor, unless there are  
21 any questions from the Court, or any statements that counsel  
22 and the committee would like to make, I'd move the transcript  
23 of the auction into evidence. I'd request that.

24 THE COURT: All right. This sale is also subject to  
25 an audit, then, I take?

1 MR. FREDERICKS: Yes. There will be an audit  
2 conducted. It's -- the audit is basically -- there will be two  
3 -- what we're selling is basically defective inventory that's  
4 currently packaged on pallets and basically will be loaded onto  
5 trucks. The buyer and the seller will each select two trucks  
6 at each location, I believe there's seven locations, by which  
7 to conduct an audit to make sure that what's listed on the  
8 pallet or what's included in the pallet actually is reflected  
9 properly on a manifest. And there are certain variances that  
10 there will be purchase price adjustments and then there are  
11 variances after you've kind of averaged them, there will be a  
12 determination about whether or not there needs to be a purchase  
13 price adjustment.

14 But, yeah, there will be an audit conducted over, I  
15 think it's scheduled to be completed by Monday.

16 THE COURT: All right, very good. And you wish to  
17 offer the transcript of the auction into evidence, you said?

18 MR. FREDERICKS: Yes, Your Honor.

19 THE COURT: Does any party object to the introduction  
20 of the exhibit?

21 (No audible response)

22 THE COURT: It will be received.

23 MR. FREDERICKS: Thank you. May I approach, Your  
24 Honor?

25 THE COURT: Yes. Thank you.

1 MR. FREDERICKS: With that, Your Honor, that  
2 concludes my presentation on that matter.

3 THE COURT: All right, thank you. And then we'll  
4 carry this over just so we have it on the -- to the March 3  
5 docket, just in case there's an objection from the committee,  
6 otherwise, you'll be removing it from the docket.

7 MR. FREDERICKS: Yes.

8 THE COURT: All right, thank you.

9 MR. FREDERICKS: Thank you, Your Honor.

10 THE COURT: This will be marked as Exhibit 1,  
11 Debtor's Exhibit 1.

12 MR. FREDERICKS: Thank you. And with that, Your  
13 Honor, I'd like to turn the podium over to Mr. Galardi, from  
14 Skadden Arps.

15 THE COURT: Thank you.

16 MR. FREDERICKS: Thank you, Your Honor.

17 MR. GALARDI: Good afternoon, Your Honor.

18 THE COURT: Good afternoon.

19 MR. GALARDI: Gregg Galardi on behalf of Circuit  
20 City. Your Honor, the last matter -- well not the last matter,  
21 the last debtor matter on the agenda is matter number 11, which  
22 was the debtor's motion under 105, 363 and 503(c) for approval  
23 of an incentive and retention plan.

24 Your Honor, to give some background and then we have  
25 two witnesses in the courtroom today. The first is Mr. Mark

1 Weinstein, who is of FTI Consulting, who is a financial adviser  
2 to the company, he's a senior manager there and also we have  
3 Mr. Marcum, who is the Vice Chairman and Acting CEO of Circuit  
4 City.

5           Your Honor, I'm pleased to say that we have resolved  
6 what we listed on the agenda as the informal objection of the  
7 creditors' committee. My understanding is, again, and it may  
8 be institutional, but not factual, the U.S. Trustee's Office  
9 may still pursue or have some comments about that, that's not  
10 unusual.

11           To give Your Honor just some background with respect  
12 to the plan, and then what we have done to change the plan and  
13 to go through the negotiations at least that started the last  
14 week that I was here. Your Honor, the plan, as you are aware,  
15 really splits up into what I'll call three groups, or three  
16 sums of money.

17           The first is what we call Tier 1 Group, which is a --  
18 we call the executives or arguably, officers of the company  
19 that could be otherwise deemed to be insiders under a strict  
20 reading of the bankruptcy code, whether or not everyone of  
21 those individuals controls control of the company, we're not  
22 going to fight over. They are officers and some 16 officers  
23 under the securities law, so we broke those into what we call  
24 the Tier 1 persons.

25           With respect to the motion, Your Honor, what we are

1 seeking authority for, with respect to the 16, and I'll give  
2 some modifications, is that that be approved under 503(c)(3),  
3 using the facts and circumstances of the case and that since  
4 they are insiders and since (c)(1) and (c)(2) are not  
5 applicable as we will argue, it's a (c)(3) and the facts and  
6 circumstances which is why I've put proffers in for today and  
7 why we think that's important.

8           Your Honor, Tier 2 is director people and below, so  
9 we don't believe they are officers, they don't carry an officer  
10 title. As we note in our motion, there is one individual and  
11 the irony is, that person was two days or three days before the  
12 bankruptcy was, in fact, given a promotion to the VP title.  
13 Whether that's actually an officer, or not, he is a VP of Asset  
14 Protection which is, essentially, the head of security at this.  
15 We don't believe this person is an insider, an officer or a  
16 person in control, and I think that's important, Your Honor,  
17 because what -- as Your Honor knows from the bankruptcy code  
18 and the BAPCA provisions, is that we believe this is -- whether  
19 it's ordinary course or not, justifiable under 363, that it is  
20 a retention program. We're not trying to give an incentive  
21 program, although we think there is value for these people and  
22 they do create value.

23           The Tier 2 people, which consisted of 137 people, are  
24 getting a retention program, and if you read 503(c), (c)(1)  
25 really, at least we read and I believe the courts in Dana and

1 other jurisdictions that I've appeared before and made the  
2 argument before, believe that if it's not an insider, it really  
3 doesn't get caught up in 503(c) in the BACRA amendments, but  
4 the BACRA amendments were really directed at the advisers and  
5 if you -- I've done this with a number of courts, if you look  
6 at the statements by, you know, Kennedy, it was directed at  
7 what he believed were abuses with respect to cases such as  
8 Polaroid, which was my case, which was not an abuse, I will  
9 say. I always put in that commercial announcement when I do  
10 this.

11 Your Honor, so with respect to retention Tier 2,  
12 these are 137 people that are below the director level, not  
13 have an officer title, with the one exception that someone  
14 could say a VP is an officer, but he was a director two days  
15 before the bankruptcy case.

16 Finally, Your Honor, we had asked for authority with  
17 respect to a discretionary fund of \$750,000. Important,  
18 because we don't I think spell this out as much, Your Honor,  
19 since commencing the going out of business sales on January  
20 16th, there are still a large number of people working at the  
21 company. People that are not included in this program, with  
22 the 16 and the 137, are approximately 250 people.

23 Again, not knowing what circumstances would occur,  
24 essentially the company requested \$750,000 of authority, or  
25 roughly 3,000 per person, to be able to retain or incentivize

1 those people but really for retention. And as we described in  
2 the motion, that \$750,000 that we originally asked for was not  
3 slotted to go to any of the Tier 1 or any of the officer  
4 people, but it was really to fill in holes and also to retain  
5 people to the extent we needed to retain, at that director and  
6 lower level and there are 250 people. So, I wanted Your Honor  
7 to understand the scope of what we were asking for discretion  
8 because this is a large company and we all read that it's  
9 putting 34,000 or 40,000 people out of work and we are talking  
10 here as to a much smaller group, but still a very large group.  
11 It takes a lot of people to wind down this operation.

12 Your Honor, once we had filed this motion and the  
13 U.S. Trustee had reviewed it, we, myself and Mr. Foley met with  
14 the U.S. Trustee. I guess it was right after the last hearing,  
15 regarding the concerns and the U.S. Trustee essentially  
16 expressed two or three concerns, in addition to the  
17 institutional concern that the U.S. Trustee's Office Generally  
18 have with these programs.

19 One, I guess I've been called the king of carve out  
20 now, because I tend to carve people out of programs. And would  
21 I consider carving Mr. Marcum out of this program, which is  
22 always a hot button with respect to any retention plan, the CEO  
23 and, again, Mr. Marcum is slightly different than other people  
24 because he's only been the CEO since April, but that's always  
25 one of the programs, so that the U.S. Trustee expressed that

1 concern.

2           The U.S. Trustee expressed a second concern with  
3 respect to the 16 and the Tier 1, the concern was, is this  
4 really an incentive. The metaphysical question, again, going  
5 back to some other background that I have, the metaphysical  
6 question is, is something really a retention or is it really an  
7 incentive, you know, and I think we've done this before in  
8 certain cases, someone could argue a paycheck is both retentive  
9 and incentive.

10           So, he was concerned with respect to those 16 people,  
11 are these people, and do I need to take depositions with  
12 respect to all 16 people to see whether in their own mental  
13 state this is really to incentivize them or is it to retain  
14 them and how do we deal with that metaphysical quandary.

15           What we end up doing with the U.S. Trustee's Office,  
16 Your Honor, and, again Mr. Weinsten and Mr. Marcum are in the  
17 courtroom if called to testify, they have reviewed this  
18 document and we prepared it for the U.S. Trustee's Office,  
19 which detailed what the responsibilities of the individuals on  
20 that list were and how those responsibilities have either  
21 increased, or the time devoted to those, or how this will  
22 motivate them. Because, again, it may seem simple that, you  
23 know, when they were operating a going concern business, they  
24 were doing one thing, and clearly their tasks have changed, but  
25 we wanted to give the U.S. Trustee the information and we



1 provided them, the U.S. Trustee's Office, with information  
2 regarding those 16 and if called as a witness, both Mr.  
3 Weinsten and Mr. Marcum would testify that their individual  
4 roles with respect to each of the 16, including Mr. Marcum, but  
5 also including the other 15, have all changed in some way,  
6 shape or form and in addition, if we called them in, many of  
7 those hours have changed significantly over this period of  
8 time, just simply because of the kinds of tasks and the demands  
9 of a restructuring or in this instance, this liquidation. We  
10 provided that information to the U.S. Trustee.

11 And, the third concern simply was to make sure, and  
12 he may have other concerns, to make sure that the people in  
13 Tier 2 and that the additional discretionary amounts, were only  
14 going to non-officer, and below director positions. And we  
15 have affirmed that subject to a modification with respect to  
16 negotiations.

17 After meeting those requirements and providing the  
18 U.S. Trustee, we also entered into negotiations with the  
19 committee and the committee refrained from filing an objection,  
20 actually, until yesterday when, in fact, we finally resolved  
21 their issues.

22 Not surprisingly, the committee raised concerns,  
23 again, this is a liquidation, they are concerned, they have  
24 expressed their concerns on multiple occasions about the  
25 expenses, the value, and getting something to unsecured

1 creditors.

2           Your Honor, as a result of those discussions with  
3 Protiviti, their financial advisors and FTI going through, they  
4 focused and I'm going to -- Mr. Weinsten can testify to this,  
5 Mr. Marcum can testify to this, as to the good faith back and  
6 forth between the parties. Again, the committee raised in our  
7 first call what I would call, I believe, anticipated  
8 objections. One, can Mr. Marcum be carved out. That's a hot  
9 button, let's talk about that. Two, the committee raised the  
10 objection that all of these percentages are way too high, let's  
11 cut them in half or some rough number by that.

12           Those were the two major objections and then, Your  
13 Honor, with respect to tasks 1 through 20, which were put forth  
14 in the objection, could we please tighten those up in certain  
15 ways, make them more specific.

16           Your Honor, in that regard, the company considered  
17 the committee's request and to a large extent, I think we've  
18 met them and to a large extent the committee has agreed to  
19 compromise significantly in favor of the form of the plan.

20           In particular, Your Honor, first of all, Mr. Marcum  
21 readily wants both parties agreed, and in light of the  
22 circumstances, to carve himself out of this package for the  
23 time being. That's an ongoing negotiation with us and the  
24 committee but it was better to have -- because of the  
25 importance of this program, Mr. Marcum willingly carved himself

1 out of the plan so he is no longer included in the Tier 1.  
2 We've put that out for another period of time to negotiate. We  
3 may be back for the same amount, we may be back for a lesser  
4 amount, I've agreed with them that I won't ask for a higher  
5 amount. But we have carved that out for the period of time and  
6 to set sort of thresholds for Mr. Marcum and to treat him  
7 separately. That also made Mr. Marcum very comfortable,  
8 testifying as to each and every one of the other 15.

9           Your Honor, as an unfortunate circumstance, one of  
10 the 15 has left us and given us notice so one of the other  
11 things that has happened is, I think it's Mr. Young who was in  
12 the program, has left us now, so we're down to 14 in that  
13 program.

14           Your Honor, then we went to --

15           THE COURT: Does that decrease the amount then?

16           MR. GALARDI: That does decrease the amount  
17 available, Your Honor. Your Honor, again, depending upon high  
18 and low, if you take Mr. Marcum's number out, \$375,000 and you  
19 take out the other individual's amount, which I think could  
20 range from 50 to 100,000, we're close to 435 to 475,000 less as  
21 a plan.

22           In addition, Your Honor, and when I go through the  
23 thresholds and the amounts, there are other ways in which,  
24 though the numbers could be the same they may, in fact, be  
25 less.

1           Your Honor, the other thing we agreed with, and so we  
2 took care of -- I mean, it wasn't an easy thing, but expectable  
3 thing that Mr. Marcum said, I will step aside on that aspect,  
4 we'll deal with me separately, it's more important for the plan  
5 and the company.

6           Your Honor, the second aspect was, we agreed not to  
7 really fight about the discretionary amounts in the following  
8 way and we reached a resolution with the committee regarding  
9 this and we've advised the U.S. Trustee of all of these  
10 resolutions.

11           With respect to the \$750,000, what we've agreed is  
12 the first \$250,000 we can use without committee consent. With  
13 respect to the next \$500,000 or up to the \$750,000, we will not  
14 use that money without the committee's consent or a court  
15 order. So if we have a disagreement with the committee, then  
16 we'll come back to court, if we don't have a disagreement with  
17 the committee we will have that extra \$500,000 amount to be  
18 able to use. So, that was another way to trim \$500,000,  
19 potentially, off and we think we'll be able to work in good  
20 faith with the committee on that.

21           The other task that's really became the financial  
22 advisor and the legal advisor task, Your Honor, was to go  
23 through the tasks, the 20 top tasks that we had identified with  
24 persons. I will tell you that the committee had asked for  
25 reductions in both the percentages at Tier 1 and as Tier 2 and

1 the company set in stone one principle which then led to the  
2 next discussions. If we were going to carve out Mr. Marcum,  
3 and we were going to agree to the discretionary amount, the one  
4 thing, and I think this is important for the company to make  
5 public, is Tier 2 was non-negotiable from our perspective.

6 It was an important point that the directors and  
7 below, not the individuals that are the more highly compensated  
8 individuals, that they had earned and will earn and are  
9 entitled to retention bonuses for the period of time. So,  
10 notwithstanding the committee's request, we set in stone one  
11 bedrock principle which was, we'll give up the other two things  
12 but we want Tier 2 to be compensated on the terms, and they  
13 agreed to that. So, we really got down to the Tier 1  
14 negotiations in addition to Mr. Marcum.

15 Your Honor, then going through and I think it's  
16 important for Your Honor to see how we have actually changed  
17 this because I think that as any compromise, there's both  
18 happiness and not happiness by both sides that people have  
19 achieved things.

20 With respect to and I have a sheet of paper, if I may  
21 hand it up to Your Honor.

22 THE COURT: You may.

23 MR. GALARDI: And, Your Honor, I will go through  
24 this. I will say that I think the committee has reviewed this,  
25 but since everything went until late last night, this may get

1 tweaked a little bit more but I think we've got it down to  
2 where I think we were.

3           Your Honor, the first task and it was very important  
4 to the company, was to achieve a guaranteed recovery of a  
5 certain amount as a result of the store liquidation sales. As  
6 Your Honor may recall from the first sheet, we had set it at  
7 percentages, 70.5, 72.5 and 74.5 and, really, that corresponded  
8 to the way at the time we filed this motion, the company was  
9 thinking of the net recovery off of the cost value of  
10 inventory. That's how the bidding had went, that's what we  
11 did.

12           Without going into detail, really, what came back is  
13 then the committee wanted percentages and we wanted percentages  
14 and then we basically figured, we need a minimum amount to meet  
15 plan and then everything else is upside.

16           Well, we had a back and a forth and this was actually  
17 the last point. We have now changed the plan that you can  
18 receive only one and only one bonus and it's a 50 percent bonus  
19 if the company hits the minimum of \$810 million, on task one.

20           Now, by modifying that task, every thread you pull  
21 will lead to something else, we've modified that task and that  
22 task essentially affected five individuals because as you may  
23 recall, task one goes to five individuals. That really meant  
24 75 and the 100 percent bonus was no longer available to those  
25 people which came to be roughly \$80,000.

1           So, my one exception to the rule I already said was  
2 Tier 1 would never get anything from the discretionary, if we  
3 should be so fortunate to get up to the 833 or the 856 number  
4 that used to be here or would have corresponded to the  
5 percentages, we will have the discretion to either use the 250  
6 that they can't consent to, to give to those individuals, or we  
7 can go to the next 500, which would use their consent. Those  
8 are the only Tier 1 people that can possibly use anything from  
9 what we've called the set aside discretionary bonus and --

10           THE COURT: And these are five individuals.

11           MR. GALARDI: -- and it's five individuals that are  
12 listed in the exhibits, the committee is aware of it, and it  
13 would only be to compensate them if we have proceeds in the  
14 amount of 833 and, I think, 856.

15           So, that was the last sort of point going back to the  
16 committee about that, but Task 1 is simply now, achieve \$810  
17 million of cash.

18           Your Honor, Task 2, we are now --

19           THE COURT: And, there's no date deadline as far as  
20 achieving that number?

21           MR. GALARDI: No, there's no date, it's really net  
22 proceeds, and the way this works, Your Honor, is the sales as  
23 I've mentioned and we'll sort of get to this as we go through  
24 some of these, the sales are going faster than expected,  
25 fortunately, they are going better than expected. We do not

1 think and Mr. Marcum would testify, as would Mr. Weinsten, but  
2 Mr. Marcum is dealing with this on a daily basis, that the 810  
3 is far from a certainty, after reconciliation and other  
4 elements that have gone, it is not a certainty by any stretch  
5 of the imagination.

6           The committee did think it was a lower number, we  
7 think it's a higher number and we just decided to give the up  
8 side up and deal with it as the discretionary and that was the  
9 back and forth there as Mr. Marcum would testify.

10           Your Honor, the next thing and because the sales are  
11 going faster than we expected, your exhibit had Task 2 broken  
12 into an A, B and C long periods of time. We believe that we  
13 will be in the very fortunate circumstance of not needing a  
14 budget for the lenders as of April 4th, the reason being is,  
15 the budget is a requirement under our DIP and as we went in on  
16 January 16th thinking about this matter, the idea was, we'd  
17 like to generate enough cash. As I mentioned at the last DIP  
18 hearing, there was an issue of whether we would cash  
19 collateralize the LCs and if we couldn't cash collateralize the  
20 LCs then we would have to extend another budget beyond that  
21 April 4th period.

22           We are -- I won't say we think it's a sure thing, but  
23 we think it's at this point, very reasonable and the one  
24 objection from the bank is that we don't pay any of this money  
25 until we do this, is that we will be able to cash collateralize



1 the LCs by March 31st, as the budget would have required.

2           If that's the case, then we don't need budgets for  
3 the bank purposes, or measures against budgets for the periods  
4 after 11 weeks, 22 weeks, 26 weeks, 52 weeks. So, we just took  
5 out those tasks and the committee agreed because we all think  
6 we're going to be able to cash collateralize the LCs.

7           So, we just eliminated two tasks and, Your Honor, we  
8 raise the thresholds from the original one and, again, this is  
9 where actually timing of the motion has hurt the company but  
10 compromised. If you go to the original 2A, Your Honor, if we  
11 simply met budget, you've got a 50 percent bonus. If you did 5  
12 percent better than budget, you got 75 percent bonus, and if  
13 you did 100 percent -- 10 percent better than budget, you would  
14 have gotten 100 percent bonus.

15           Again, we suffered from our success in this aspect  
16 with respect to the committee because as of today, we're 10  
17 percent ahead of budget. So, they use that to say, well, you  
18 gave yourself a leg up. Now, we don't think we did, but we  
19 agreed to compromise that and in Task 2 what we've said is,  
20 that if we achieve for the 11 week period a 5 percent better  
21 than budget, it's 50 percent, if it's 8 percent it's 75  
22 percent, and then we raised the hurdle above 10 percent to still  
23 give people an incentive, to 12 percent for the 100 percent  
24 bonus. We're hopeful that we'll make that 12 percent, but with  
25 that, the committee was comfortable with the numbers that we

1 had provided at that point.

2 Again, going into January 16th and I do want to  
3 emphasize this, we didn't know where the proceeds were when we  
4 put it together or the budget, but we took some away to say  
5 they can use a little bit of hindsight, although there were  
6 many discussions about whether that was fair or not.

7 THE COURT: And just to put that percentages in  
8 perspective, when you go from 5 percent to 8 percent and 8  
9 percent to 12 percent, what are the savings to the company that  
10 we're realizing or getting in exchange for that?

11 MR. GALARDI: Can I take a break one second to answer  
12 your question?

13 (Pause)

14 MR. GALARDI: Your Honor, I should have anticipated  
15 your question. Just rough numbers, it's over -- it would be 50  
16 million would be the budget, so it would be over a \$5 million  
17 savings to budget.

18 THE COURT: All right. Thank you.

19 MR. GALARDI: And we feel comfortable, it's probably  
20 a larger number than that, I don't know is Protiviti knows.  
21 Okay, so, it's about that. So, a 10 percent savings would be  
22 \$5 million, so it would be a savings to the company that way.

23 Your Honor, the next one that changed was the Task 4  
24 and, again, we suffered to some extent, but the committee gave  
25 back on this one, where it hadn't given before, we suffered

1 again by being into the sale period. Task 4 used to provide  
2 that we would have sufficient cash to cash collateralize the  
3 LCs over a period of time. We said that we would have to have  
4 that by the dates, it used to be that Task 4 said, pay down  
5 senior lenders, excluding cash collateral of LCs now, what we  
6 have revised it to say is pay down senior lenders, including  
7 maintaining sufficient cash to collateralize the LCs by the  
8 following dates. We're not sure we may have made it by the  
9 14th, we think we'll make it by the 28th, we'll definitely make  
10 it by the 14th. We're hopeful and that's why we're in a  
11 position to have eliminated 2A and 2. Again, that's critical  
12 for two reasons.

13 One, that will bet the loan paid off, or resolved;  
14 two, it's a great incentive because the banks, the only concern  
15 or objection to this entire plan is that until their cash  
16 collateralized, none of the money would be paid under this  
17 plan. Our timing for payments only begins in 13 weeks, so it  
18 was very important that we get to this point. We think we're  
19 comfortable with that point. And so, we think they will achieve  
20 the bonuses there, but we no longer needed the excluding, which  
21 as \$100 million of proceeds. So it was very important that we  
22 got there and I think we are going to get there from the sales.  
23 So, that was a modification, again.

24 The committee knew we were getting there, so they  
25 didn't use hindsight against us in this one and conceded as

1 long as we got to that cash.

2 Your Honor, the next task that I believe changed  
3 significantly was Task 9. And I think this helps with one of  
4 the objections, Your Honor, and I do want to point this out.

5 Task 9 says prepare and document exit strategy for  
6 wind down of benefit plans, including health plans, 401k's  
7 pension plan, that enables the company to be able to recapture  
8 any over funded positions. We said now, we've put a minimum of  
9 at least \$10 million. So, one, there will have to be some  
10 return to the company and we've had meetings today with respect  
11 to the pension plans, we're hoping to get some money back.

12 The reason I say that partially goes to one of the  
13 objections today, Your Honor, and I think even the papers pick  
14 up on this, and I think it's an unfortunate pickup because it  
15 seems to misunderstand COBRA and what the law is all about.

16 The fact of the matter is, Your Honor, you have to,  
17 when you don't have a benefit plan any more in a liquidation  
18 like this, you don't have a place to place a COBRA and that's  
19 an unfortunate circumstance. COBRA, as I'm sure Your Honor  
20 knows, requires people to pay 103 percent of the benefits  
21 anyway, so it's generally self-funded.

22 What this task does and the person working on this,  
23 Your Honor, is actually trying to find placements for those  
24 people that would have termination of insurance when the WARN  
25 Act ends and we've given people WARN Act and 60 days notice and

1 they're in contact with people such as Blue Cross/Blue Shield,  
2 to see if there is a placement. It's just an unfortunate fact,  
3 you can't offer COBRA. The aspect of this is there is a person  
4 who is dedicated to make sure that we do this, and do this  
5 right and my own personal experience is, many times when you  
6 liquidate and if you let people go, this doesn't get done right  
7 and that is something, and if you look at the dates, they're  
8 tagged to dates where it will be by the end of the WARN Act  
9 period, which is 3/31. The WARN Act really, our time frame  
10 runs 3/20 and followup periods, but this with respect to the  
11 health benefits, they're going to be done during the WARN Act  
12 period. With respect to the pension, we have an over funded  
13 pension, that's going to take a lot longer to see if we can  
14 realize value. But they are very much focused on the health  
15 plans and it is just an unfortunate fact that COBRA cannot be  
16 offered, really, under these circumstances.

17           So that was one task that changed, but now it put in  
18 a threshold of \$10 million to earn the bonus so, again, that  
19 more than pays for itself.

20           The next change, I think, Your Honor, was of  
21 significance, is we did, in fact, change the wording in Task 11  
22 to say that the completion of the physical 2009 tax returns,  
23 that will result in collections of income tax funds of \$16  
24 million, so there was more of a causal relationship, a little  
25 tightening up there than the previous one.

1 Task 13 was just a word change. Task 14, 15, 16 and  
2 17 all were changed to put various provisions in there, again,  
3 to make it obvious that it is incentivized to maximize the  
4 values of the estates.

5 Your Honor, with respect to Task 14, the original  
6 task had numbers 2.5, 5 and 10 million to get a reduction of  
7 administrative expenses charge backs, those numbers have now  
8 been raised to \$5, \$10 and \$15 million dollars so, again, a  
9 straight value, a higher hurdle to achieve to be able to  
10 receive the incentives, review and research listings of letters  
11 of credit as of the sale date which results in cancellation.  
12 Well, the sale date was January 16th, Your Honor, and as I  
13 presented to Your Honor at that point, I think the LCs were  
14 roughly \$93 million to cash collateralize them. We had a  
15 threshold, much lower thresholds in, you know, I think it was  
16 2.5, 5 and 10 million, with the committee, we've agreed to go  
17 up to 10, 15 and 20, which would be a benefit, has to benefits.  
18 To the extent we get the cancellation or the runoff, then we're  
19 being able to cash collateralize the LCs of the bank; two, to  
20 the extent we can get funds back which we are hopeful to do and  
21 we're working on it now with respect to a captive insurance  
22 company not in the bankruptcy, we will be able to cancel LCs,  
23 good for the banks and to bring cash back into the estate. So,  
24 again, large value, again with the committee we got through  
25 that.

1           The other next one was Task Number 16, Your Honor.  
2 Task 16 said, you had to simply obtain court approval of sale  
3 of Canadian assets by 2/28, 3/31 or 4/20, it was date, but not  
4 value driven. We were on -- and we are getting very close to  
5 that sale, but what we did, instead of just having dates, Your  
6 Honor, is, we wanted to make sure that the U.S. received value,  
7 so now we have successfully obtained Court approval of sale of  
8 Canadian assets that realizes to the United States a minimum of  
9 15 million and greater than 50 million. So, again, tagged  
10 directly to dollars. We think the time frame, though somewhat  
11 relevant, is less relevant than the net proceeds. I am pleased  
12 to say that we're moving very quickly on that and I think we  
13 will be doing well with that sale and coordinating with Canada  
14 has gone well over the last period of time.

15           For Your Honor's information, the court in Canada, I  
16 think yesterday, approved the third amendment that Your Honor  
17 had approved previously, or on Monday, they had done so without  
18 objections and with the support of the monitor this time. So,  
19 Your Honor didn't get any calls, I hope, from Canada this time.

20           Your Honor, with respect to the next matter, we are  
21 at Task Number 17, successfully obtain approval of the sale of  
22 internet assets. Again, that used to be tagged to a date,  
23 2/28, 3/31 and 4/30, we have now changed that to amounts, in  
24 excess of 4 million, 6 million and 8 million.

25           Your Honor, so with that, instead of just simply

1 getting things by dates, it was to get them for value.

2           Your Honor, so those were the changes that we  
3 negotiated with the committee after much back and forth and  
4 much investigation by the advisors. We have come to an  
5 agreement on those tasks. I don't know, I may have left one or  
6 two out that were changed, but those were the significant  
7 tasks. Again, believing that one, the thresholds were now set  
8 high enough to increase the incentives, and two, to justify the  
9 pay outs.

10           Turning, now, Your Honor, just to brief proffer of  
11 Mr. Weinsten, to give Your Honor comfortable about the process  
12 other than the back and forth, and then to turn the podium, I  
13 think to the U.S. Trustee. Your Honor, Mr. Weinsten is in the  
14 courtroom today, he's next to Mr. Marcum. If called as a  
15 witness, he is a senior managing director of FTI Consulting and  
16 that FTI Consulting, as you know, has been employed as the  
17 financial consultants to the company.

18           As part of the engagement, Mr. Weinsten was brought  
19 in to help formulate right around the time and right before the  
20 time of the store closings, an incentive and retention program.  
21 If called as a witness, Mr. Weinsten would testify that the  
22 company had been working on an incentive and retention program  
23 with respect to a going concern but, unfortunately, we had no  
24 going concern and the timing for filing such a motion just  
25 never really materialized.



1           Mr. Weinsten would further testify that he has  
2 extensive experience in Chapter 11 retail and other matters  
3 and, in particular, that he has extensive experience in  
4 developing incentive and retention plans, both prior to and  
5 after the BAPCPA amendments to the bankruptcy code. In that  
6 regard, Mr. Weinsten would testify that he reviewed the Circuit  
7 City plan and helped formulate the plan with members of  
8 management and other advisors such as my firm, with respect to  
9 trying to come up with a plan that both had the retention  
10 elements that the company required, with respect to directors  
11 and below, and incentivize those persons who would, under  
12 BAPCPA not be entitled to or not be able to get a retention or  
13 severance payment.

14           With respect to that, Mr. Marcum, the other members  
15 of the company and Mr. Weinsten met on numerous occasions and  
16 they developed the 20 or so tasks that we have just gone  
17 through and revised those tasks. Mr. Weinsten, again, with Mr.  
18 Marcum and the company then developed the percentage bonuses,  
19 both for the retention amounts as well as the incentive bonuses  
20 and then Mr. Weinsten looked at those with respect to two plans  
21 in particular that he was most familiar with and court  
22 approved, those in KB Toys, and those in -- what's the other  
23 one, I'm losing it, it's the W one, but I will come --  
24 Mervyn's, rather, it's not a W, it's an upside down M.  
25 Mervyn's case, in which they had similar plans upon

1 liquidations where they would get recoveries.

2           Mr. Weinsten then looked at the overall amounts of  
3 those plans and that's as filed and determined that those  
4 amounts in his view and based on his experience with respect to  
5 these matters, was reasonable and within the range of those  
6 plans, at some points in the low end, at some points on the  
7 higher ends, but within the range of reasonable, that, again,  
8 for a company of this size and with this kind of wind down.

9           Mr. Weinsten would also testify that in choosing  
10 those tasks, what was a fundamental concern of the company for  
11 both Mr. Marcum, Mr. Weinsten and the company itself, was to  
12 execute on the wind down budget that it was negotiating and to  
13 maximize the recovery and minimize expenses that those tasks  
14 were tailored to do that.

15           Mr. Weinsten would then testify that with respect to  
16 this matter, he brought this matter to -- that they divided the  
17 people, as I already mentioned into Tier 1 and Tier 2, those  
18 who were officers and those who were not officers and that he  
19 believes that they could accomplish the requirements of  
20 incentivizing those people to maximize the value of the company  
21 and the value of the assets for distribution and to minimize  
22 costs with respect to the top 16 and with respect to those 137  
23 in Tier 2 to retain those people to do such tasks as exiting  
24 leases, making sure security is in places.

25           Mr. Weinsten then would testify that he made his

1 presentation both to the Compensation Committee and to the  
2 board, both of whom have approved this plan and that in his  
3 view under the facts and circumstances of this case and given  
4 the challenges facing the company, that with respect to Tier 1  
5 that this is warranted use of cash or use of its assets to pay  
6 the Tier 1. With respect to Tier 2, that it is within any  
7 range of reasonable a retention plan and with respect to the  
8 discretionary amounts, that the discretionary amounts are both  
9 necessary and will be critical for the company to maximize  
10 value by way of either maximizing value assets or minimizing  
11 costs over the period of time that the company is facing.

12           Mr. Weinsten would, if called as a witness, opine  
13 that this is fair, reasonable and in the best interest of the  
14 company. Mr. Weinsten would also testify, having participated,  
15 that it is the result of back and forth, arms length  
16 negotiations with the committee over the last few weeks with  
17 respect -- over the last week, with respect to at least the  
18 Tier 1, Mr. Marcum, the discretionary bonus, and Tier 2 and  
19 that he would recommend that the Court approve this plan and  
20 that this plan is within the range of reasonable with plans  
21 that have been approved by other courts and that it complies  
22 with what he understands, not being a lawyer, the requirements  
23 of 363 and also 5039(c).

24           I don't know if anyone would like to cross examine Mr.  
25 Weinsten.

1 THE COURT: At this point would anybody in the  
2 courtroom wish to examine Mr. Weinsten?

3 (No audible response)

4 THE COURT: All right. Mr. Galardi, the Court will  
5 accept the proffer of his testimony.

6 MR. GALARDI: Thank you, Your Honor. I'll try to be  
7 briefer with Mr. Marcum.

8 With respect to Mr. Marcum, if he's called as a  
9 witness, he would testify that he is the Vice Chairman and  
10 Acting CEO. That prior to the announcement of the full store  
11 chain liquidation, he was -- that the company was already  
12 experiencing some significant employee turnover and retention  
13 issues as well as incentives.

14 Your Honor, with respect to the people in the Tier 1,  
15 Mr. Marcum would testify that all of them have employment  
16 contracts, that provide for severance, annual bonuses, and that  
17 all of them, or most of them would have received had we not  
18 filed bankruptcy, significant annual bonuses on January 10th of  
19 2009, as well as significant incentive plan bonuses in May.

20 Mr. Marcum would also testify that as a result of  
21 their learning that bankruptcy and what that has on the effects  
22 of employment contracts, faced significant issues through the  
23 months of December and January, retaining those people that are  
24 necessary, such as the 16 or 15 of the other people on that  
25 list. That immediately upon the determination that the company

1 would do a chain wide liquidation, Mr. Marcum and actually a  
2 little bit before, began commencing the process and  
3 commissioned, essentially FTI and myself, and others at the  
4 company to come up with the incentive plan through the Human  
5 Relations Department, the outside advisors that would comply  
6 with BAPCPA and also serve the purposes of the company.

7           That that plan, and Mr. Marcum would testify that it  
8 was directed to make sure that the company met the wind down  
9 budget presently being negotiated at that time and also to  
10 maximize value by way of two essential principles, realize the  
11 assets, on the assets and to minimize costs.

12           In addition, Mr. Marcum would testify that the other  
13 concern was that within 60 days or shorter, the company would  
14 lose most of the people available and that they would  
15 immediately start working jobs and with a company this size, it  
16 was of critical importance to formulate the records and keep  
17 the materials available so that the professionals and those  
18 people remaining behind, could maximize assets such as vendor  
19 recoveries, charge backs, and that he charged and met with  
20 people from the heads of each of the companies legal, Mr.  
21 Hedgepath, Ms. Moser from financial, and other departments to  
22 pick among those people who would be best to realize value for  
23 the estate.

24           That Mr. Marcum would testify that he has had daily,  
25 since the day of liquidation, and the sale, GOB's process and

1 even before that, has had retention problems and incentive  
2 problems with the company's keeping the critical employees at  
3 the company and that this plan is absolutely necessary at this  
4 point to create an incentive and retention plan that the people  
5 most critical, to be able to maximize value and minimize costs,  
6 remain with the company through the various wind down periods.  
7 That in consultation with FTI and company management, that this  
8 plan has been calculated to keep those people necessary for 13  
9 weeks, 26 weeks, 52 weeks, so that you can have an orderly wind  
10 down. That, in fact, in Mr. Marcum's opinion, this plan has  
11 already had a positive effect with respect to the sales.

12           For example, Mr. Marcum would testify that the sales  
13 have proceeded after the announcement of this and even in the  
14 formulation of this, to be able to increase sales at the GOB  
15 process by, for example, having security, a minimize shrink.  
16 By having people realize that we need to get out of facilities.  
17 Mr. Marcum would also use as an example the distribution  
18 centers which now have been eliminated, all of the property,  
19 and as Mr. Fredericks has now told us, selling a lot of the  
20 defective inventory to enable us to reduce expense, such as  
21 lease expense, distribution expense. That, in fact, the  
22 company has become single focused, to make sure that all  
23 expenses.

24           With respect to any concerns, whether this is simply  
25 people doing their jobs, or what their paid to do, Mr. Marcum

1 would testify that these people are not only doing their jobs,  
2 they're doing more than what they had done before and different  
3 tasks than what they had done before. It is not common for  
4 these people, for example, the head of merchandising to call up  
5 the vendors and say, pay us all of these monies, now that  
6 you've owed us for years or whatever, to reconcile those  
7 amounts, to put them in the records. These are outside the  
8 ordinary course of their employment and that these people have  
9 responded very favorably and beneficially for the estate.

10 So, Mr. Marcum would further testify that, again,  
11 with respect to legal advice and Mr. Weinstein's advice that the  
12 company determined to split people into Tier 1, Tier 2 and to  
13 have a discretionary bonus. Mr. Marcum would testify that he  
14 is not satisfied with the 250,000 and the discretion to consent  
15 but, nonetheless, as a compromise is willing to live with that  
16 and we anticipate coming back to the Court or to the committee  
17 with respect to an amount above the \$250,000.

18 That Mr. Marcum would further testify that this is  
19 absolutely critical, necessary and warranted by the facts and  
20 circumstances of this case, to be able to one, incentivize the  
21 14 remaining people in the Tier 1 pool, to achieve the goals on  
22 those 20 tasks, and that the tasks are, in fact, not lay ups,  
23 not simple and, in fact, will result in, if you made the 100  
24 percent, as much as \$250 million greater value to the estate.

25 Mr. Marcum would also testify with respect to Tier 2,

1 that these are people that could otherwise simply find jobs in  
2 this economy and that the retention bonuses are, in fact,  
3 necessary to retain these people and, indeed, may even  
4 sometimes be inadequate as we've learned because people will  
5 still find other jobs. This may not keep them here, but it is  
6 the best we can do with the funds that we have.

7           With respect to what I'll call the Tier 3, those  
8 people, the 250, Mr. Marcum fully intends to make sure that we  
9 can respond to the needs of the company and with respect to  
10 those people that are not on the list, that it would be an  
11 intention to use this money to, in fact, retain those people  
12 for such thing as the sale of the IP and the other assets for  
13 which we don't have people on this plan and that it was a very  
14 difficult decision to exclude certain people. But that it was  
15 better to have a pool to respond to circumstances on a daily  
16 basis.

17           Again, Your Honor, Mr. Marcum would testify that he  
18 believes it's in the best interest of the creditors and the  
19 estates and we think that the creditors have recognized that by  
20 cooperating and reaching a reasonable resolution of this plan  
21 and supporting this plan and we would ask Your Honor, and he  
22 would ask Your Honor to approve the plan.

23           Your Honor, again, just for my two cents worth, I  
24 haven't been at a liquidating company that has cared as much  
25 about the employees and I would just note two facts about that.



1 One, as Your Honor knows and, again, over the committee's  
2 objection and I understood it well, we came to this court the  
3 first day paying WARN to people that we terminated prepetition  
4 and as you read every day, every filing, it is now the action  
5 du jour to terminate employees and not pay WARN. This company  
6 has been concerned about its employees and continues to be  
7 concerned about the employees in this community.

8 Two, Your Honor, we have said, and I said to Your  
9 Honor, on the sale, we are paying WARN to the employees today  
10 that we had to let go on January 16th. That is actually, as Mr  
11 Marcum would testify, a blessing because there has been  
12 circumstances, for example, when we had an issue at the stores,  
13 to be able to call those people back in. They are still ready,  
14 willing and able to serve, they have, in fact, implemented a  
15 plan to make sure that these people haven't obtained and got  
16 WARN and gotten it, so it has been a benefit to the company.

17 And, again, with respect to the benefits, we've  
18 continued the insurance, we continue to pay benefits, and we're  
19 doing everything to make the smoothest transition. So, Your  
20 Honor, we think that both the incentive, the plan and the  
21 retention plan should be approved. Again, I know there's been  
22 much and I don't like to read the paper here, but leaving that  
23 aside, the plan is now drafted, Your Honor, it is not a top  
24 heavy plan with respect to directors. With these  
25 modifications, I think the maximum amount of the plan is maybe

1 \$4 million of which 1.6, I think, goes to the Tier 2 and the  
2 discretion in addition, goes to Tier 2 or below.

3           So, I think it's important that, and, again, Mr.  
4 Marcum did want to make -- by taking himself out, taking  
5 another executive out, and making the hurdles, again, often  
6 these things get a lot of press but it is the fact that this is  
7 not a top heavy plan and it was, and I think it's important,  
8 and Mr. Marcum would testify, as Mr. Weinstein said, Tier 2 was  
9 a non-negotiable, the discretionary essentially was  
10 non-negotiable, as the amount and that really all benefits to  
11 the director and below level. As to the other level, those  
12 people are people that will realize significant value as much  
13 as \$250 million.

14           Your Honor, with that, we would ask for your  
15 approval, but I know the U.S. Trustee may have a comment as  
16 well as the committee.

17           THE COURT: Well, before -- I did have a question on  
18 that very last point.

19           MR. GALARDI: Sure.

20           THE COURT: It was in your papers, you did talk about  
21 the incentive plan resulting in incremental proceeds of \$250  
22 million, but I didn't hear that number in your proffers and I  
23 just wondered, is that still the target number, if we hit all  
24 of these incentives in your plan?

25           MR. GALARDI: Your Honor, actually I think the number

1 is probably increased because of the thresholds that the  
2 committee has, in fact, asked us, and we have consulted with,  
3 it's actually now a higher number than probably the 250. The  
4 only thing I can say backwards is because on that Task 1 where  
5 we took out the extra numbers, that's not in there, so I  
6 haven't done the back of the calculation but 200 is still in,  
7 and I think Mr. Weinsten and Mr. Marcum would testify that that  
8 200 million, 250, plus or minus \$10 to \$20 million is still, if  
9 you were to achieve the 100 percent bonuses here, the company  
10 would achieve that, around that number of additional, either  
11 cost savings or asset value for the company to be able to  
12 distribute to the general unsecured creditors or administrative  
13 creditors of this case.

14 THE COURT: All right. And I am also impressed that  
15 your incentive plan includes incentivizing the company, to  
16 develop the exit strategy for the wind down benefit plans,  
17 including the health plans.

18 I would like to hear from other parties at this  
19 point.

20 MR. GALARDI: I didn't pass Mr. Marcum, I don't know  
21 if anyone wants to cross examine Mr. Marcum. I forgot that,  
22 I'm sorry.

23 THE COURT: Oh, I'm sorry. Does anybody in the  
24 courtroom wish to cross examine Mr. Marcum with regard to the  
25 proffer of his testimony?

1 (No audible response)

2 THE COURT: All right, that proffer will be received  
3 as well. Thank you.

4 MR. GALARDI: Thank you, Your Honor.

5 MS. BERAN: Good afternoon, Your Honor, for the  
6 record, Paula Beran, may it please the Court. I'm standing  
7 before Your Honor, as you know, as counsel to the Official  
8 Committee of Unsecured Creditors. With me as well on the line  
9 is Mr. Rob Feinstein.

10 Your Honor, the committee does stand before you,  
11 today, supporting the plan as modified and as indicated in the  
12 --

13 THE COURT: This is your money.

14 MS. BERAN: Yes, Your Honor, it is and Mr. Galardi's  
15 representations to the Court are accurate. In essence, Your  
16 Honor, that the committee did have some initial concerns and  
17 had some serious initial concerns. Thereafter, the committee  
18 and its professionals spent a substantial amount of time  
19 negotiating with the debtors, and their professionals. The  
20 committee truly believes that those negotiations were done in  
21 good faith, that the committee truly appreciates all of the  
22 debtor's and its professionals and its managements effort and  
23 the information exchange that was received during this process.  
24 In addition, as Mr. Galardi represented to the Court,  
25 the debtor, after that exchange did agree to certain

1 modifications, albeit not all of the requested modifications of  
2 th committee, nonetheless, the committee believes that that  
3 exchange was healthy and productive and that the resolution  
4 that's put before Your Honor today is truly in the best  
5 interest of the estate.

6           Given the same, as well as the current liquidation  
7 situation of this company and the fact that the committee  
8 really desires that administrative expenses be limited, i.e.,  
9 that we not stand before Your Honor having a huge battle over  
10 this, similarly, that the debtor and its professionals focus on  
11 liquidation in a cost effective manner as well as maximizing  
12 the value of its remaining assets for the benefit of the  
13 estate. The committee does stand before Your Honor in support  
14 of the plan as modified.

15           With me today, Your Honor, also at counsel table, is  
16 Mr. Guy Davis of Proviviti who is the financial advisors to the  
17 committee. To the extent necessary, Your Honor, Mr. Davis is  
18 prepared to testify on the specifics as to why the committee is  
19 in support of the modified or revised plan and specifically why  
20 the committee does believe it is now in the best interest of  
21 the estate. Thank you, Your Honor.

22           THE COURT: Would Mr. Davis be able to testify that  
23 he's in agreement that the incremental proceeds that would be  
24 realized from the incentive plan be in the neighborhood of \$250  
25 million?

1 MS. BERAN: Your Honor, if I may beg the Court's  
2 indulgence and confer with Mr. Davis as it relates to that.  
3 Thank you.

4 (Pause)

5 MS. BERAN: Your Honor, as it relates to what Mr.  
6 Davis could testify, he has not done the math specifically as  
7 the debtor and its professionals have done but, nonetheless,  
8 given the calculations and the analysis that Protiviti has  
9 completed, Mr. Davis would testify that give or take \$20  
10 million, that the net benefit to the estate would be  
11 approximately the 250 million.

12 THE COURT: So, it's a significant benefit.

13 MS. BERAN: Yes, Your Honor.

14 THE COURT: All right. Thank you. Does any other  
15 party wish to be heard in connection with the incentive plan?

16 MR. VAN ARSDALE: Robert Van Arsdale for the U.S.  
17 Trustee. Your Honor, we come before the Court to object to the  
18 plan, and, albeit the plan that we did object to has been  
19 altered in many significant ways, including ways that change  
20 points that we made in our objection.

21 THE COURT: I thought largely in response to some of  
22 your objections, such as timing dates as opposed to actual  
23 dollar figures, coming into the estate.

24 MR. VAN ARSDALE: Exactly, Your Honor. And while I'm  
25 not in a position to say that that cures all the problems, I

1 would simply like to address the Court, probably on a more  
2 overarching kind of view of this.

3           And it really stems from what are we to make of 503.  
4 At this point, with the number of decisions that we've had,  
5 many of which have come down on the side of an interpretation  
6 that if there is some portion of the plan that is incentivizing  
7 and I think Mr. Galardi was correct when he talked about the  
8 metaphysics of incentive versus retention, those two things are  
9 more like DNA, I mean they're all wound up in each other,  
10 depending on what particular point you are in the development  
11 of the plan and where we are in terms of whether people are  
12 going to start jumping ship. It's not clear. And it's so  
13 unclear that some courts, like in Nelson Nutraceutical, what  
14 the judge there decided to do was add a word. We'll add a word  
15 to the statute so it says that it's primarily for retention.  
16 Unless it's primarily for retention, then it's not really  
17 covered by 503(c)(1).

18           And, the reason that it's really important for the  
19 debtor not to be covered by 503(c)(1) in this instance is when  
20 you get down to the other portions of 503(c)(1), you have such  
21 things as that they would have to prove that they have bona  
22 fide job offers. My experience has been, from private practice  
23 as well as government service, that when you have a bona fide  
24 job offer in this circumstance, you're gone.

25           THE COURT: That's why we're down to number 14

1 instead of 15.

2 MR. VAN ARSDALE: I mean, that's what happens. The  
3 second part of this, when you're talking about a liquidation  
4 plan, when you get to part B, the services provided by the  
5 person are essential to the survival of the business.

6 Well, it's not going to survive, I mean we already  
7 know that.

8 THE COURT: But doesn't that beg the whole question  
9 about whether 503(c) is applicable to a liquidating debtor at  
10 all? I mean, because you could also read it to say that it  
11 talks about, you know, to remain with the debtor's business, we  
12 don't have a business that's going to be here.

13 MR. VAN ARSDALE: No, we don't and the problem that  
14 that presents is, what do you -- what if you say, okay, it  
15 doesn't apply, but the words are there, it seems to mean  
16 something and it does stem from Senator Kennedy thinking that  
17 people on the top drawer here, Tier 1, were getting too much  
18 and need to calm down and had this legislation passed, so that  
19 would happen. And, it continues to happen.

20 Now, it's written in a way that's very difficult to  
21 know what it's supposed to apply to, but where in Nutraceutical  
22 they say -- they take and put in primarily, I guess we could  
23 take and put in 10 percent, if it's 10 percent retention,  
24 that's enough.

25 The situation that we have here isn't completely



1 outside of the statute. This is the situation where you have  
2 different tiers of people and now we have 14 left at the top  
3 tier, who have benefitted greatly as this company was doing  
4 well and who, by the intention if not the wording, the  
5 intention of the statute should not be allowed to get more than  
6 what they would normally get in this circumstance. And that  
7 really is the key point that I'm trying to make. And some of  
8 the examples of some of the problems in the plan were pointed  
9 out in our objection because those problems made it less  
10 incentivizing and made it more retentive.

11           Having said that, I know that debtor's counsel and  
12 counsel for the committee and the two professionals who have  
13 analyzed and crunched the numbers have worked very hard to get  
14 to this point, and I know that many of the changes that were  
15 made in here strip away some of the points that the Office of  
16 the U.S. Trustee was making in its objection. But on the main  
17 point, whether this type of plan should go forward in these  
18 cases for officers, for the people who ran the company, on that  
19 main point it would still be our contention that the intention  
20 of 503(c) is the answer to that question, is no.

21           THE COURT: But don't you think if the unsecured  
22 creditors are standing up saying, wait a second, we know we're  
23 going to spend this \$4 million or so on this incentive plan and  
24 you know, our expert tells us if we do spend this \$4 million  
25 we're going to realize for this estate, you know, somewhere in

1 the neighborhood of \$250 million, that that's a pretty good  
2 investment, isn't that their call? I mean, it seems like we're  
3 spending their money to do this.

4 MR. VAN ARSDALE: Your Honor, I understand that and  
5 that is their call, and what the debtor is trying to do is  
6 their call. And, this is my call. And this is our call and  
7 this is what sometimes I have to do in order to fully represent  
8 my client.

9 THE COURT: So, what your point is, is if it has any  
10 retention aspect to it at all, then it has to fall into 503(c).

11 MR. VAN ARSDALE: Your Honor, I wouldn't even go that  
12 far, because as has been pointed out in the other cases, that  
13 would keep you from paying salaries because the salary itself  
14 has a retentive value.

15 THE COURT: Exactly.

16 MR. VAN ARSDALE: I mean -- so, I don't think that  
17 that's right. I'm not sure that primarily is right, either,  
18 because what we have to enter into is sort of this fill in the  
19 blank analysis of the law as it is written and all the law says  
20 is, retention.

21 THE COURT: In some of the cases they talk about,  
22 well, as long as the incentive is not a lay up, we'll use a  
23 basketball analogy, I guess, and maybe it's a free throw, or  
24 it's got to be a three pointer, I'm not sure, but as long as  
25 it's something, you know, more difficult than just routine.

1 MR. VAN ARSDALE: Well, and some of those things are  
2 easier to discern as not being incentivizing. If you get to  
3 the point where all of the marks that you're using to  
4 incentivize somebody, it happened in the pass, to continue the  
5 basketball analogy, one of my cohorts said, it's not that these  
6 people didn't score enough baskets, they didn't even know they  
7 were playing basketball because it had already happened. So  
8 that's -- and that's not here. That's not here.

9 THE COURT: But here we're saying, you've got to win  
10 the game. And isn't that the better analogy?

11 MR. VAN ARSDALE: What I wonder, with that analysis,  
12 is what does it do to 503(c)? It's like it is gone. And that  
13 can't -- that's not something we're supposed to just allow to  
14 happen.

15 THE COURT: Well, we're not paying somebody under  
16 this plan, as I read it, just to keep them around. We're  
17 giving the specific goals, saying, bring this amount of dollars  
18 into this bankruptcy estate and then you will be rewarded for  
19 making that happen and that's -- you know, I would assume the  
20 committee would sit here and say if Joe Smith out on the street  
21 can bring \$250 million into this estate from some place else,  
22 we don't know about, we'd probably pay the \$4 million, too.

23 MR. VAN ARSDALE: Your Honor, I agree that that would  
24 be a great thing, I think some of that, and correct me if I'm  
25 wrong, but I think some of that \$250 million also involves a

1 lot of work by other people. I think one of the tasks involved  
2 is to gather up all the information that's needed to look at  
3 chargebacks and everything. That money won't come until Mr.  
4 Galardi and his group get together and figure out what to do  
5 with it and how to turn it into cash. It's not instant money,  
6 I don't believe.

7 THE COURT: I realize some of it is instant, some of  
8 it's delayed. But you're not going to be able to realize it  
9 unless you lay the groundwork.

10 MR. VAN ARSDALE: Yes, yes. Your Honor, that's all I  
11 have for the Court. I mean, we have listened with great  
12 interest and have been kept well informed by both the debtor  
13 and the Creditors' Committee about what they were up to. I  
14 think it does do some good to see that a lot of the tasks that  
15 we were objecting to have been changed to make them more  
16 directly incentivizing.

17 THE COURT: I think the motion or the objection filed  
18 has had a very positive impact on what the final result was.

19 MR. VAN ARSDALE: Thank you, Your Honor.

20 THE COURT: Mr. Galardi, do you wish to respond?

21 MR. GALARDI: Yes, Your Honor, just because, again,  
22 just so that we have the sort of statutory framework because I  
23 think we've got to think, what's the rule, what's the  
24 exception, what's the exception to the exception because if you  
25 go through this, I think you start with, and why we do it this

1 way. 363 says that we can use money outside the ordinary  
2 course. So, let's presume it's outside the ordinary course.  
3 So, one, I can do that in business judgment, I think we've  
4 satisfied that standard.

5 Then it goes, can I pay an allowed administrative  
6 expense because this is post petition, that's 503(b), it says,  
7 yes. So now we get to 503(c), which says, yes, but you can't  
8 pay it, right, 503(c) says, you can't, notwithstanding it may  
9 be an actual expense, notwithstanding it may be 363(b), it says  
10 you can't pay it, and neither shall be paid or allowed and it  
11 gives three exceptions and I don't want it to sound like every  
12 one of these is a retention because it says, one, we can't pay  
13 if it's retention, except in the circumstances the U.S. Trustee  
14 commented.

15 But if you went there, but then it goes to (c) and it  
16 says, but if it's ordinary course and it's not justified by the  
17 facts, then you can't pay it, but if it's justified by the  
18 facts, it's not ordinary course and it's not retention, so it  
19 doesn't do any of those nots, it can be paid.

20 So, I think the U.S. Trustee's position, and having  
21 done this a number of times, it's actually reading retention to  
22 swallow up and essentially eviscerate (c)(3). (3) says, if the  
23 circumstances justify it and it's not the retention that's not  
24 allowed in (1) and it's not the severance that's not allowed in  
25 (2), you can pay it. So, their burden is to come forward and

1 say, this is retentive.

2 Now, I know retention and it says, okay, you state X,  
3 regardless of what results you make, that's retention. But if  
4 you have to get results in a certain time frame or to a certain  
5 amount that may -- people may see it, it's that carrot that you  
6 talked about that's dangling in front of them. I can make a  
7 lot money here if I can do it. That certainly has the  
8 retention because you've got to do it to get to the carrot, but  
9 the purpose and I think this is where the courts and Judge  
10 Sontchi in Nutraceutical, and I may not agree about  
11 predominant, but the fact of the matter is, it's -- you've got  
12 to show, they've got to show that there's a reason to bar the  
13 payment under (c)(1), they've got to show that it is retentive  
14 and it's solely retentive or, you know, not primarily not  
15 retentive.

16 And I think what we've shown here is that it's not to  
17 stay though a date, it's not to stay and just earn your money,  
18 it's to stay and meet goals. And I think that's why you can't  
19 read (c)(3) out of the exceptions because it says if it's not  
20 one of those two things, you can pay it outside the ordinary  
21 course, to insiders, as long as the facts and circumstances  
22 justify it.

23 I think the committee's review, our review, Mr.  
24 Marcum's testimony, Mr. Weinsten's testimony, and the fact and  
25 circumstance here overwhelmingly say the business judgment has

1 been properly applied, it's not retentive, it's not severance,  
2 in fact, they've lost their retention bonuses, they've not got  
3 the severance payment and this is to compensate them for  
4 certain goals. So, we think statutorily it's permissible and  
5 (c)(1) can't swallow up (c)(3). Thank you.

6 THE COURT: Thank you. Anything further, Mr. Van  
7 Arsdale?

8 MR. VAN ARSDALE: No, Your Honor.

9 THE COURT: All right. Does any other party wish to  
10 be heard in connection with this matter?

11 (No audible response)

12 THE COURT: All right. The Court is going to approve  
13 the incentive plan as has been modified and put on the record  
14 today. I think it does properly incentivize the people that  
15 are in Tier 1 to produce value for this estate and is,  
16 therefore, appropriate under Section 503(c)(3) and the Court  
17 will approve the incentive plan, as well as the plan for Tier 2  
18 and Tier 3. And Mr. Galardi, I'd ask that you prepare the  
19 order to that effect.

20 MR. GALARDI: Yes, Your Honor, and we will circulate  
21 it to the committee so that we can get the revised tasks as  
22 part of that order.

23 THE COURT: All right, thank you.

24 MR. GALARDI: Thank you.

25 THE COURT: All right. We've got one matter

1 remaining on the docket, I believe, which is not the debtor's.

2 UNIDENTIFIED MALE SPEAKER: Yes, Your Honor, we also  
3 may have a status report to give to the Court with respect to  
4 the auction, lease auction dates that we're confirming right  
5 now with DJMS, but we can take that up if we need to make that  
6 report to the Court.

7 THE COURT: And the Court also had a question on a  
8 matter not on the docket, too, regarding the appeal that has  
9 been taken, the direct appeal. Do I need to certify that as  
10 far as being interlocutory? Because there was a request that  
11 had been made to the Court and I don't know if it's ever been  
12 brought on, is that something I still have to do or has that  
13 been rendered moot by the joint filing?

14 MR. EPPS: Your Honor, A.C. Epps Jr., for the  
15 appellants in that direct certification.

16 My first comment is, I'm not sure. But my -- but I  
17 believe that you do not have to do anything else.

18 THE COURT: Okay.

19 MR. EPPS: I believe that what the next step is,  
20 that we have to petition to the Fourth Circuit to accept the  
21 interlocutory appeal, and that's where the interlocutory issue  
22 is raised. That's my understanding, but my first comment is my  
23 last, which is that I am not sure. I'm going to do my --

24 THE COURT: When I read the rule that's what it  
25 looked like to me, too, but I wasn't sure, I wanted to make



1 sure that you weren't waiting on me to do something. If you  
2 change your mind on that and need to come back, let me know.

3 MR. EPPS: Yes, sir.

4 MR. FOLEY: Your Honor, we will be -- we're actually  
5 going to be talking to Mr. Epps after the court hearing today  
6 about some other aspects of the direct appeal that we're  
7 talking about.

8 THE COURT: I guess the other question I had, there  
9 were other parties that noted appeals as well. Are those  
10 appeals going to be consolidated with this appeal or are those  
11 going to go to the district court when this one goes to the  
12 Fourth Circuit, or what are we doing there?

13 MR. FOLEY: Go ahead.

14 MR. EPPS: Your Honor, that's under discussion. I'm  
15 sure that if nothing else happens, that the Fourth Circuit will  
16 consolidate them. We've discussed it with several of the other  
17 appellants at this stage and what we're trying to avoid is to  
18 have a mass meeting of some kind, we're trying to put some  
19 order into the process, I don't know the answer but I feel  
20 confident to the last ounce that the Fourth Circuit will  
21 consolidate them if it takes the case.

22 THE COURT: Well, you might ask the Court to do that,  
23 because right now the clerk is struggling to know where he's  
24 supposed to send these files.

25 MR. EPPS: Yes, sir.

1 THE COURT: All right, thank you.

2 MR. FOLEY: Thank you, Your Honor. If the debtors  
3 can be excused, at least for this last matter that's going on  
4 with Ms. Hudson, we may be back, Your Honor, before the end of  
5 that matter to give you a status report on the auction.

6 THE COURT: You may be excused.

7 MR. FOLEY: Thank you, Your Honor.

8 UNIDENTIFIED FEMALE SPEAKER: Item 13 on debtor's  
9 amended agenda, motion by Schimenti Construction Company for  
10 2004 examination of and production of document by North  
11 Plainfield VF, LLC.

12 MR. PERKINS: Good afternoon, Your Honor, Chris  
13 Perkins of LeClair Ryan, on behalf of Schimenti Construction  
14 Company, LLC. I'm joined on the telephone by my co-counsel,  
15 Patrick Birney of the law firm Robinson & Cole, in Hartford,  
16 Connecticut. Mr. Birney has been previously admitted pro hac  
17 vice in this matter and he's here to argue the motion today.

18 THE COURT: And I entered an order, if I recall,  
19 earlier in this, granting him permission to appear by telephone  
20 and argue the motion today.

21 MR. PERKINS: That's correct.

22 MR. BIRNEY: Good afternoon, Your Honor, Patrick  
23 Birney, Robinson & Cole on behalf of Schimenti Construction  
24 Company, LLC.

25 THE COURT: All right, thank you.

1 MR. BIRNEY: Thank you, Your Honor, for allowing me  
2 to appear telephonically for today's hearing.

3 THE COURT: Okay. And now, from Ms. Hudson, would  
4 you please state your appearance, as well?

5 MS. HUDSON: Yes, Your Honor, Lisa Hudson, I'm here  
6 on behalf of North Plainfield VF LLC, on my motion to quash an  
7 objection to that motion for 2004 examination.

8 THE COURT: Okay. So -- just from my standpoint, are  
9 we here today on your objection or are we here on the motion  
10 for the 2004 exam, or I guess who is going first in all of this  
11 and what am I being asked to decide?

12 MS. HUDSON: Who's on first, what's on second. I  
13 agreed with local counsel Tara Elgie to notice all three, the  
14 motion, my motion to quash an objection and their reply for  
15 today, so it's an omnibus on that, and I'm happy to concede to  
16 counsel on the telephone, since he's the moving party.

17 THE COURT: Okay. Mr. Birney, then you may proceed.

18 MR. BIRNEY: May it please the Court, Your Honor,  
19 thank you very much. Schimenti Construction Company, not like  
20 many other construction entities that are involved in this  
21 Circuit City case, provided construction and fit out work for  
22 several of the debtor's property, including construction and  
23 fit out work for a store in North Plainfield, New Jersey.

24 The store was leased to the debtor by North  
25 Plainfield VF LLC, which I'll refer today as the landlord,

1 which itself, Your Honor, is subject to a lease with a ground  
2 landlord. Schimenti has moved to conduct the Rule 2004  
3 examination of the landlord, and if Your Honor grants the Rule  
4 2004 motion that Schimenti has filed with the Court, we would  
5 subsequently issue a subpoena with a document request in  
6 accordance with Rule 9016 of the Federal Rules of Bankruptcy  
7 Procedure.

8           Your Honor, I need not consume the Court's time  
9 recounting Rule 2004 this afternoon, and what courts including  
10 courts in this district say about the purpose and reach of  
11 2004, but because of the arguments raised by the landlord in  
12 this case, I wanted to cite to Bankruptcy Judge Shelley in the  
13 Nucletron Manufacturing case where he said that the, Judge  
14 Shelly said that the scope of the examination under Rule 2004,  
15 is extremely wide, some going as far as saying that Rule 2004  
16 allows for a fishing expedition.

17           I raise that point, Your Honor, not because this is a  
18 fishing expedition, but just to underscore the fact that our  
19 inquiry with regards to the landlord and the document request  
20 that we ultimately will be serving pursuant to the subpoena, is  
21 tightly focused on the relationship between the debtor and its  
22 landlords arising out of the lease agreements for the store in  
23 question.

24           Specifically, and this is laid out in our papers,  
25 Your Honor, our goal here is to ascertain whether the store

1 lease or the ground lease, or any other agreement, for that  
2 matter, provides for the allowances of the work that has been  
3 performed by Schimenti. In turn, this information may directly  
4 affect the debtor's liability to Schimenti, it may directly  
5 impact the landlord's prepetition or rejection claim against  
6 the debtor, and it may raise additional issues with regards to  
7 the administration of the debtor's bankruptcy estate.

8           And, to that point, Your Honor, I note that the  
9 landlord has submitted a Chang affidavit and submitted the  
10 Chang affidavit in support of its motion to quash and although  
11 artfully and carefully crafted, we sensed that there was a  
12 credibility gap between some of the arguments that Ms. Chang  
13 stated in her affidavit and some of the -- or some of the facts  
14 that were stated in the Chang affidavit, and some of the  
15 arguments that were put forth by the landlord, in opposition of  
16 our legitimate efforts to conduct a Rule 2004 examination.

17           For example, Your Honor, in the motion to quash at  
18 paragraph 39, the landlord states that there is no information  
19 to divulge. But Ms. Chang, in her affidavit avers to five  
20 statements, five statements with regards to information that go  
21 to the heart of the inquiry and go to the heart, Your Honor, of  
22 the documents that Schimenti seeks. We believe that this is  
23 prima facie evidence that the inquiry is appropriate.

24           Additionally, Your Honor, the affidavit states that  
25 all the documents have been filed in this proceeding. Well,

1 Your Honor, the landlord's motion to quash states that the 130  
2 page lease was too voluminous to attach and, in fact, the only  
3 portion of the lease that was attached, was attached in the  
4 landlord's motion to compel, filed back in early January, and  
5 that only -- actually, Your Honor, it was filed in late  
6 December, and only contained seven pages of the lease.

7           So, Your Honor, there's a disconnect between the  
8 arguments raised in the motion to quash and the Chang affidavit  
9 and based on the case law that we cited in our brief, we  
10 believe that this disconnect, both in the area of inquiry and  
11 in our request for documents, supports the ability for us to  
12 have the Rule 2004 motion granted, and allow and enable us to  
13 ultimately issue a subpoena pursuant to Rule 9016.

14           And, with that in mind, Your Honor, one additional  
15 point. There were issues raised, subtly, in both the motion to  
16 quash and the Chang affidavit regarding a protective order. To  
17 the extent that Your Honor treats the landlord's motion as, in  
18 fact, a motion to quash, our position is, they have not met  
19 their burden to quash our subpoena on any of the issues, based  
20 on the area of inquiry, or the documents that Schimenti  
21 Construction seeks in accordance with its motion. Thank you,  
22 Your Honor.

23           THE COURT: Thank you. Ms. Hudson.

24           MS. HUDSON: Your Honor, if I might just cut to the  
25 chase here, the motion for a 2004 examination, we believe

1 should be dismissed because procedurally it's flawed. It was  
2 filed as a discovery motion without any consultation and  
3 doesn't include the statement that the local rules require. We  
4 have a disagreement about whether this is a contested matter,  
5 not that 2004 is a discovery tool, but amongst counsel whether  
6 or not that requirement applies.

7           Even if it doesn't, we believe it should be denied  
8 because it is, indeed, a fishing expedition. Their Exhibit A  
9 asks for anything regarding debtor's liabilities. Well, we  
10 have filed that post petition motion, which they joined in  
11 because it compelled the debtors to pay off liens which is a  
12 violation of the lease, to allow liens to apply to the  
13 property, in paragraph 13, and it is my understanding and  
14 representation to counsel's colleague this morning that we did,  
15 indeed, attach, we said in our footnote, that excerpts were  
16 attached, but it was a 130 page document, and it is voluminous  
17 but to the extent that that's not complete, we had offered  
18 prior to today, to supply that under a protective order. It  
19 has terms of art, it has negotiated terms, it's not something  
20 we want passed around, general public knowledge. If it was  
21 previously filed in toto, that was inadvertent and we don't  
22 think it's unreasonable to ask for a protective order to  
23 protect the terms of that lease.

24           So, our post petition motion did set forth those  
25 liabilities that relate to the debtors. We also directly, the

1 landlord filed a proof of claim, that was a prepetition  
2 damages, post petition damages, rejection damages, in the  
3 claims register. Those are the only two things that relate and  
4 this lease, I have represented, Ms. Chang represented in what  
5 they now say is artfully crafted, in an affidavit that was done  
6 as a settlement tool and then became attached to the ultimate  
7 objection we had to file, but she's represented that the lease  
8 is all there is and there's no tenant allowance paragraph, and  
9 if they'll sign a protective order, we'll give them that so  
10 they can go down the table of contents and the paragraphs and  
11 know that this is a new Circuit City lease, boilerplate lease,  
12 no tenant allowance. You can't produce what you can't produce.

13 THE COURT: If it's a boilerplate lease, then why is  
14 it subject to this need for a protective order?

15 MS. HUDSON: Well, on the terms of tenant work and  
16 tenant allowance, negotiated terms for money and terms of trade  
17 that were specific in the exhibits is really what I'm referring  
18 to, not the missing paragraph on tenants allowance. I mean, I  
19 represent to the Court, knowing all of my obligations, that  
20 there is no such thing, the paralegal that does all leases in  
21 bankruptcy has 16 years experience, has been at Vernado, which  
22 is the parent company, for five years, represents to me she has  
23 reviewed the file. She then reviewed the file again with me,  
24 there is no tenant allowance. And all there is is the lease  
25 and we're happy to provide the lease, but to compel her to come



1 to Virginia to LeClair Ryan's offices for a half a day or a day  
2 from Paramus, New Jersey, to say, no, no, no, and no, to me is  
3 an abuse of 2004, because it is restricted by its very own  
4 terms saying it may relate only to acts, conduct, liability,  
5 aspects of administration of the estate of the debtor and the  
6 only thing we can speak to is liabilities, and on the public  
7 record in the claim registry and in this docket, and what we're  
8 willing to supply, again, to the extent it's not fulsome under  
9 a protective order, is all that we can do. Our lease has been  
10 rejected, it's not property of the estate any more, it was  
11 surrendered. You asked me, would we accept it, at a hearing on  
12 1/16 and it was surrendered, actually, the day prior. So, this  
13 is no longer part of the estate. They say that's a red  
14 herring, we say no, but their dispute is with the debtor.

15 I mean, this is under tenants work, we had no  
16 involvement with Schimenti. We had a lease, yes, 8/23/06, with  
17 the debtor and sometime thereafter the debtor entered into fit  
18 out work and construction work with Schimenti. And we believe  
19 that work was completed and we know they claimed 620 some  
20 thousand dollars, partially secured, secured. All we say is,  
21 debtor you violate the lease by allowing those liens to be on  
22 the property, not that we consented, not that we were a party,  
23 not that we signed any agreements and I just question the  
24 futility of bringing her down here and counsel has since  
25 conceded, since they didn't consult prior to setting the date

1 for documents to be produced, and setting the deposition date,  
2 she's on vacation, but they said, well, we'll have it our New  
3 York office, but we won't accept your representations, Ms.  
4 Hudson, we won't accept the affidavit and I said, well, can I  
5 make her available for a phone call, I mean, let's not take a  
6 discovery dispute to the court. You guys should have done your  
7 homework before filing this. You don't just file something  
8 with a five business day notice reply on ECF and snail mail it.  
9 By the time I got it, I had to react immediately, and we're a  
10 landlord for ten different landlords and Circuit City, let  
11 alone the other four mega cases this Court is facing right now.

12           So, I appreciate the extension they gave me to reply  
13 and we have worked after the fact, but the duty to confer and  
14 to narrow these disputes was before, and I'm very troubled that  
15 Exhibit A of their motion for a 2004 exam, goes far beyond the  
16 lease. It is not tightly constructed. It goes far beyond our  
17 relationship even with the debtor. All documents, all  
18 accounting and reports, all communications with us and any  
19 other person, all written communications with us and the debtor  
20 not even germane to the lease, I don't even know how I would  
21 compel those, if those are even complied, if they are even  
22 retained. All I can say is that there is no tenant allowance,  
23 we hold no monies, it would have been in our post petition  
24 motion to the Court, they would have mentioned it at the  
25 hearing when Ms. Elgie participated, it is unfortunate that we

1 have no such money, they must be aware of that in the ordinary  
2 course in other cases, but it does not exist here.

3 And to compel Ms. Chang to come to Virginia, to come  
4 to their New York offices, or wherever, even if they go to New  
5 Jersey, is going to be a day of no, no, no and no, the lease  
6 didn't obligate us to do any of that, and we don't have it.

7 THE COURT: Is the New York office with 100 miles of  
8 her place of business or residence?

9 MS. HUDSON: I have to defer to counsel on that, and  
10 they have told me when I raised those objections to the mileage  
11 fee and the witness fee, that they would be willing to work on  
12 that, but I do not know the distance from Paramus to their  
13 office, or even to North Plainfield's New York counsel, Fried  
14 Frank. There would be several options for doing this, if it  
15 has to be scheduled, but the other problem I have is that their  
16 reply brings in this ground lease and the ground lease was done  
17 some decade before today, and had nothing to do with Circuit  
18 City. That was done back in 1999 or 2000 and isn't even in  
19 their motion. They mention it for the first time in the reply.  
20 So, they're trying to bootstrap any other related matters and a  
21 ground lease and all of these other parties, all employees and  
22 communications that's just way overly broad here, when this  
23 comes down to a lease and a proof of claim both of which Ms.  
24 Chang, in her duties, knows that lease and collection of that  
25 lease in bankruptcy, she prepared the proof of claim with

1 management at Vernado, and she said all that she can say in the  
2 affidavit. There is nothing further that can be compelled  
3 here. I'm trying to prevent an exercise in futility and my  
4 credibility is not accepted.

5           The affidavit, by the way, I represented to counsel  
6 before coming here today, why would it be any different with a  
7 court reporter and with this -- in a setting of a deposition  
8 because she has signed her notary clause on February 12th  
9 saying that she swears the information contained herein is  
10 truthful and accurate. That the only governing document is the  
11 lease, there is no tenant allowance provision therein, they  
12 hold no escrow or any other monies, the only way the lease can  
13 be amended is by written agreement, there is no written  
14 agreement, she's reviewed everything in the file with me,  
15 regarding brokerage agreements, things long before Circuit City  
16 ever became involved, and these guys have no right and  
17 entitlement to review. And this is burdensome to us, this  
18 costs a lot of money, obviously, we got our post petition  
19 motion denied, we haven't been paid. Yes, the property was  
20 surrendered to us, but our claim is out there for everybody to  
21 see and our lease we will supply under an appropriate  
22 protective order, but they shot everything down, despite the  
23 settlement overtures, which I don't know what those are, other  
24 than moving the venue of the deposition and the date of it, but  
25 to me that's hardly a settlement overture when I'm trying to

1 produce the information and cut to the chase.

2 THE COURT: Well, aren't they entitled to examine the  
3 witness, though?

4 MS. HUDSON: Well, we say no, Your Honor, only -- the  
5 rule specifically says it may relate only to the acts of the  
6 debtor, we know nothing about that. The conduct of the debtor,  
7 we know nothing of that. The property of the debtor, it's not.

8 THE COURT: Well, you say you don't know any of that,  
9 but, I mean, aren't they entitled to ask those questions? I  
10 mean, you know, counsel cites the Nucletron case, I'm familiar  
11 with that case, and that's exactly what Judge Shelley said in  
12 that case.

13 MS. HUDSON: Well, Your Honor, I guess if the lease  
14 weren't open and closed and it were ambiguous as to whether or  
15 not it contained a tenant allowance provision and we didn't  
16 already have matters filed on the record that conclusively  
17 state the nature of the debtor's liability to us and why we  
18 filed to remove those liens, because it's a violation of the  
19 mechanics lien section of the lease, and if we didn't have this  
20 affidavit of Ms. Chang and we didn't have the proof of claim  
21 out there with all of our damages, and a schedule, that may be  
22 necessary to ascertain the scope of our knowledge, but when  
23 what's going to come to bear is exactly what's being  
24 represented today, it's an exercise in futility and it's an  
25 exercise in futility for them and for us and their dispute here

1 is with the debtor. That's who they have an agreement with,  
2 their own motion says that's who they have a contract with, we  
3 did not consent to it, we don't know anything about it, we  
4 weren't a party to it and to come in with our ground lease,  
5 that's not even mentioned in their motion, but they put it in  
6 their reply, has nothing to do with Circuit City, that's  
7 something back in 1999. How should that be part of this scope?

8 THE COURT: I don't know but maybe they want to find  
9 out why it doesn't have anything to do with Circuit City.

10 MS. HUDSON: Well, at a minimum, I would say that  
11 Exhibit A needs to be carved back and that all correspondence  
12 between us and the debtor is not appropriate here, this is  
13 about tenants allowance and construction work, not all  
14 communication and employment --

15 THE COURT: Well, you say that, but how do they know  
16 that? Maybe their claim is broader than that?

17 MS. HUDSON: Their claim is, they've specified it, is  
18 for fit out work and construction associated with the North  
19 Plainfield store. I'm not aware of anything broader than that.

20 THE COURT: All right. Well, the Court, as you say,  
21 is going to cut to the chase, too. I think that the 2004  
22 examination is in order, I think you need to produce a witness  
23 on behalf of your client, whether it's Ms. Chang or somebody  
24 else, and testify to these matters. I don't think that the  
25 exhibit is over broad, that is attached to it.

1 I do think that you are entitled to a protective  
2 order for any proprietary information that you may be asked to  
3 reveal and if you cannot negotiate a protective order, then  
4 both counsel can submit proposed orders and the Court will  
5 enter one of them, one or the other of them.

6 Also, I don't think that Ms. Chang, or your  
7 representative, need to come to Richmond, Virginia. I think  
8 that you can do that in New Jersey or in New York if that's  
9 within a 100 mile radius of where she either lives or works,  
10 and she's entitled to the witness fee, as well as the mileage.  
11 Any questions on the Court's ruling?

12 MS. HUDSON: Your Honor, and it's up to us in the  
13 order today to just reschedule the date in light of Ms. Chang's  
14 vacation?

15 THE COURT: Yes, I'd like you to reschedule that with  
16 counsel, to a time that's mutually convenient. Again, if the  
17 two of you can't agree on a date, submit that to me as well,  
18 proposed dates and I'll pick one.

19 MS. HUDSON: Thank you, Your Honor, I --

20 MR. BIRNEY: Your Honor --

21 THE COURT: Yes, sir?

22 MR. BIRNEY: Your Honor, just -- you had asked a  
23 question, I didn't want to interrupt counsel, North Plainfield  
24 and Paramus are approximately 39 miles from Midtown Manhattan.  
25 And, Your Honor, we had intended to serve a subpoena pursuant

1 to 9016 which would have -- that's when we would have tendered  
2 the witness fees and, obviously, we could not have issued the  
3 subpoena until such time as Your Honor granted the Rule 2004  
4 motion.

5 THE COURT: Right. I'm aware of that. So, if it's  
6 within 39 miles, then you could do it in New York.

7 MR. BIRNEY: Yes, Your Honor.

8 THE COURT: And so that will be fine. And I would  
9 expect counsel to be able to agree on the terms of a protective  
10 order as well as the terms or the agreement on a date and not  
11 have to bother me about it, but if you can't, you can, like I  
12 said, submit that to me and I'll pick it.

13 MS. HUDSON: Thank you, Your Honor.

14 MR. BIRNEY Thank you, Your Honor.

15 THE COURT: Thank you both. Mr. Fredericks?

16 MR. FREDERICKS: Yes, Your Honor, Ian Fredericks,  
17 again, for the record. I apologize to come back before you.  
18 There is one matter that's not on the agenda that we wanted to  
19 bring to the Court's attention.

20 As you may recall at the last hearing you approved an  
21 order establishing lease procedures, including auction dates  
22 and related dates and procedures. In an ongoing effort to  
23 evaluate the lease sales/rejection termination process, the  
24 debtors believe that they may think moving the March auction  
25 date up from March 5th to an earlier date may be in the best



1 interest of these estates, given the lease market. They are  
2 still consulting with their real estate advisor, DJM and they  
3 will consult with the committee before making a final  
4 determination, but in the event the debtors determine that they  
5 should be moved up, they may submit a supplemental order  
6 establishing an earlier auction date. I just wanted to advise  
7 the Court that that may be coming at some point in the future.

8 THE COURT: All right. And I assume that you'll be  
9 able to give the appropriate notices to everybody that's  
10 involved then in the process and such, so that by moving the  
11 date we don't do anything to deter bidding or anything of that  
12 sort.

13 MR. FREDERICKS: Yes. That's one of the matters  
14 that's being discussed with DJM. DJM is in regular contact  
15 with both the landlords and interested bidders, there's a  
16 finite group of interested bidders in addition to the landlords  
17 that they've been in discussions with. And that's one of the  
18 considerations that we're discussing with DJM.

19 THE COURT: All right, thank you.

20 MR. FREDERICKS: Thank you, Your Honor. With that, I  
21 don't believe there's -- I'll turn it back over to Mr. Foley.  
22 Thank you, Your Honor.

23 THE COURT: All right, thank you.

24 MR. EPPS: Your Honor, A.C. Epps, Jr., again for the  
25 appellants in the potential direct appeal. Your Honor, after

1 you questioned us before, when we were discussing this in the  
2 hall, we'd point out that we did at the Court's suggestion,  
3 submit an agreed order on this issue.

4           The clerk was of the opinion that you didn't, and  
5 perhaps, even shouldn't sign it, but we think you should. And  
6 we think that it does help because ordinarily the rule seems to  
7 say that upon the Court's certification, it doesn't say  
8 anything about what happens when you have the joint  
9 certification of the parties, but we do think it does two  
10 things. One is to make sure that the Appellate Court knows  
11 that this Court does know what we're up to and doing and the  
12 second is, I think it does fill in the gap in the procedure. If  
13 it's the wrong thing to do it's nothing worse than duplicative.

14           THE COURT: All right. So, has that been submitted  
15 to me in a form that I would be able to sign?

16           MR. EPPS: It was submitted on BOPS several days ago,  
17 Your Honor.

18           THE COURT: Okay. Because I don't know that I've  
19 seen that.

20           MR. EPPS: I think the clerk had it.

21           THE COURT: Okay. I'll make appropriate inquiry and  
22 find out about that. I know that in the one that Judge Adams  
23 certified to the Fourth Circuit, he made the certification as  
24 well. And that's really where I was coming from, both from the  
25 interlocutory as well as that. I mean, I'm perfectly happy to

1 certify it and so I think we need to get an answer on that.

2 MR. EPPS: Well, the sketch order that was submitted,  
3 we think is fairly complete. If it's more complete than the  
4 Court desires, it is in Word format, I think, or in an  
5 appropriate Word format for BOPS and you can take the red  
6 pencil to it, as the Court prefers.

7 THE COURT: Okay.

8 MR. EPPS: Your Honor, with regard to your question  
9 about what do we do about these other appeals, Mr. Foley and I  
10 need a day or two, no more than two days, but we need to figure  
11 that out, at what we think our best suggestion is and get back  
12 to you as soon as we can.

13 THE COURT: All right, very good.

14 MR. FOLEY: Your Honor, Doug Foley for the debtors,  
15 Your Honor. The point of the certification, obviously,  
16 everybody is in agreement with doing this, and, obviously, I  
17 think the Court understands the importance of having this issue  
18 heard, we want to make sure that we follow the most expedient  
19 path to get to the Fourth Circuit and I think Your Honor's  
20 entry of an order and participation in the certification in an  
21 informal way will certainly help that process and with respect  
22 to the other landlord counsel, and landlords that may want to  
23 either join the appeal, or consolidate, again, our concern is,  
24 cost and expediency of having this matter heard. If it can be  
25 consolidated in a way that makes sense, where there's not

1 duplicative brief writing, then maybe that makes sense, but  
2 another way to go is to have the other ones stayed pending this  
3 one being ruled on, since it will affect everyone in the case.  
4 Again, we're just concerned about cost and speed because those  
5 are the things that we're concerned about.

6 THE COURT: And, the Court, obviously, concerned  
7 about the cost, too, to keep the administrative expenses down  
8 in the case and we don't need to have duplicative appeals going  
9 in difference directions. So, either consolidation or staying  
10 the other ones makes perfectly good sense to the Court. So,  
11 let me know which way you want to proceed and we'll handle it  
12 accordingly.

13 MR. EPPS: We will. Your Honor, if for some reason  
14 that order is misplaced, it's our computer at Christian &  
15 Barton and we'll send it again.

16 THE COURT: Yes. I'll get back to you if I need to  
17 have you resubmit it.

18 MR. EPPS: Thank you.

19 THE COURT: Is there any other business we need to  
20 take up this afternoon?

21 MR. FOLEY: No, Your Honor, thank you.

22 THE COURT: Thank you.

23 COURT CLERK: All rise. Court is now adjourned.

24 \* \* \* \* \*

25

C E R T I F I C A T I O N

I, ELAINE HOWELL, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter and to the best of my ability.

/s/ Elaine Howell

Date: March 5, 2009

ELAINE HOWELL

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